St. John's Law Review

Volume 51
Number 1 *Volume 51, Fall 1976, Number 1*

Article 6

July 2012

Retroactive Seniority as a Remedy for Past Discrimination: Franks v. Bowman Transportation Co.

Rosemary T. Berkery

RETROACTIVE SENIORITY AS A REMEDY FOR PAST DISCRIMINATION: *FRANKS v. BOWMAN TRANSPORTATION CO.*

INTRODUCTION

Seniority systems have become a firmly entrenched employment practice in the United States[1] and are presently embodied in virtually every collective bargaining agreement.[2] An employee's accumulation of seniority determines a wide variety of employment benefits[3] including promotions, vacations, wage increases, and overtime opportunities.[4] Moreover, job security, perhaps the most important function of seniority systems, becomes especially significant in times of spiraling unemployment. During the current economic slump with its resultant mass layoffs, seniority systems have been subject to close scrutiny. Minorities with little or no seniority have attacked seniority systems under Title VII of the Civil Rights Act of 1964,[5] alleging that were it not for past discrimination, they would have acquired sufficient seniority to avert their layoffs. As a result of these challenges, courts have been forced to determine whether Title VII permits remedial action where, except for the effect of past discrimination, seniority systems are clearly valid.

The Supreme Court in 1971 declared that under Title VII, "practices, procedures, or tests neutral on their face, and even neu-

---

[1] *See* BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, BULL. NO. 1209, ANALYSIS OF LAYOFF, RECALL, AND WORK-SHARING PROCEDURES IN UNION CONTRACTS 19 (1957). The importance presently attached to the use of seniority clauses in determining layoff procedures is illustrated by the results of a study of major collective bargaining agreements conducted by the United States Department of Labor in 1970-1971. The Labor Department found that seniority played some role in determining layoffs 99% of the time; it was a major factor 44% of the time; and it played no role in determining layoffs in less than 1% of all agreements surveyed. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, BULL. NO. 1425-13, MAJOR COLLECTIVE BARGAINING AGREEMENTS: LAYOFF, RECALL, AND WORKSHARING PROCEDURES 54, table 11 (1972).

[2] *See* Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 75 HARV. L. REV. 1532, 1534 (1962) [hereinafter cited as Aaron]. Seniority provisions are found in approximately 90% of all collective bargaining agreements entered into in the nation. *See* BNA, BASIC PATTERNS IN UNION CONTRACTS (8th ed. 1975). The significance of this statistic is indicated by the fact that an estimated 26 million workers are covered by collective bargaining agreements. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, DIRECTORY OF NATIONAL UNIONS AND EMPLOYEE ASSOCIATIONS 88 (1974).

[3] *See* S. SLICHTER, J. HEALY & E. LIVERNASH, THE IMPACT OF COLLECTIVE BARGAINING ON MANAGEMENT 106-15 (1960); Stacy, *Title VII Seniority Remedies in a Time of Economic Downturn*, 28 VAND. L. REV. 487, 490 (1975).

[4] *See* Aaron, *supra* note 2, at 1535.

[5] 42 U.S.C. §§ 2000e to 2000e-17 (1970 & Supp. V 1975).

tral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."[6] Generally, the "last hired, first fired" provisions contained in most seniority agreements are racially neutral and objective in application to all employees.[7] A problem arises, however, with minority workers who, because of a denial of employment opportunities in the past, are presently the employees with the least seniority. In such instances, the application of a "last hired, first fired" principle to determine the order of layoffs affects a disproportionate number of minority workers.[8] Aggrieved minorities have claimed that the application of seniority systems to layoffs perpetuates past discrimination, and as such is violative of Title VII.[9] Their demands for the use of other methods for determining layoff schedules or for the award of seniority retroactive to the date of their original employment application have met with conflicting results among the circuits.[10] The Supreme Court recently confronted this issue in

[6] Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971).

[7] *See* Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598, 1603 (1969) [hereinafter cited as Cooper & Sobol]. *See generally* Aaron, *supra* note 2; Gould, *Employment Security, Seniority and Race: The Role of Title VII of the Civil Rights Act of 1964*, 13 How. L.J. 1 (1967).

[8] *See* Totenberg, *Recession's Special Victims: Newly Hired Blacks, Women*, N.Y. Times, Mar. 9, 1975, § 4 (Week in Review), at 1, col. 7. A layoff of 2300 employees by General Motors in its Fremont, California plant in January 1975 included practically all of the 500 women who worked on the assembly line. These women were among the last hired and had been precluded from attaining a more secure position on the company's seniority scale because of the company's failure to hire women for assembly line jobs prior to 1968.

[9] *E.g.*, Acha v. Beame, 531 F.2d 648 (2d Cir. 1976); Meadows v. Ford Motor Co., 510 F.2d 939 (6th Cir. 1975), *cert. denied*, 96 S. Ct. 2215 (1976); Watkins v. USW Local 2369, 516 F.2d 41 (5th Cir. 1975); Jersey Cent. Power & Light Co. v. Local 327, IBEW, 508 F.2d 687 (3d Cir. 1975), *vacated and remanded in light of* Franks v. Bowman Transp. Co., 96 S. Ct. 2196 (1976); Waters v. Wisconsin Steel Works, 502 F.2d 1309 (7th Cir. 1974), *cert. denied*, 96 S. Ct. 2214 (1976).

[10] *Compare* Acha v. Beame, 531 F.2d 648 (2d Cir. 1976), *and* Meadows v. Ford Motor Co., 510 F.2d 939 (6th Cir. 1975), *cert. denied*, 96 S. Ct. 2215 (1976), *with* Jersey Cent. Power & Light Co. v. Local 327, IBEW, 508 F.2d 687 (3d Cir. 1975), *vacated and remanded in light of* Franks v. Bowman Transp. Co., 96 S. Ct. 2196 (1976), *and* Waters v. Wisconsin Steel Works, 502 F.2d 1309 (7th Cir. 1974), *cert. denied*, 96 S. Ct. 2214 (1976). In *Acha v. Beame*, female police officers subject to prior police department discrimination in hiring and now discharged pursuant to the "last hired, first fired" method of layoffs brought an action seeking constructive seniority back to the date they would have been hired had there been no discrimination. The Court of Appeals for the Second Circuit decided that the layoff of any female police officer who, but for her sex, would have been hired early enough to accumulate sufficient seniority to withstand the present layoffs is violative of Title VII's prohibition against sex discrimination. The defendants argued that the layoff procedure they utilized was protected as a "bona fide" seniority system under § 703(h), and that an award of constructive seniority to the plaintiffs would be violative of that section. The court concluded that the

Franks v. Bowman Transportation Co.,[11] and held that retroactive seniority may be awarded to identifiable applicants who were discriminatorily denied employment after the effective date of Title VII.

Franks v. Bowman Transportation Co.

In *Franks*, a class action[12] was instituted against an interstate trucking company that had allegedly used various racially discriminatory employment practices in violation of Title VII. The district court found that the company had engaged in a pattern of racial discrimination, particularly in its failure to hire blacks directly as over-the-road (OTR) drivers (class 3 plaintiffs) and in hindering blacks already employed in lower paying jobs from transferring or being promoted to the OTR department (class 4 plaintiffs). In its final remedial order, however, the district court declined to grant backpay and retroactive seniority in the OTR department to the members of classes 3 and 4.

On appeal, the Court of Appeals for the Fifth Circuit held that the district court had erred in denying backpay to members of both classes 3 and 4, and vacated the judgment in that respect.[13]

---

seniority system could not be considered "bona fide" until the past discrimination against these female police officers is rectified by awarding them the seniority status which they would have obtained absent discrimination. The *Acha* court also declared that retroactive seniority is a remedial device included within the powers conferred upon the district courts by § 706(g). Similarly, the Court of Appeals for the Sixth Circuit in *Meadows*, confronted with the defendant employer's discriminatory hiring practices, held that Title VII does not prohibit the grant of retroactive seniority and that the choice of remedies vests in the first instance in the district court. On the other hand, the Court of Appeals for the Third Circuit in *Jersey Central* and the Court of Appeals for the Seventh Circuit in *Waters* held that a facially neutral seniority system, even if it perpetuates the effects of past discrimination, is "bona fide" within the scope of § 703(h). Concluding that last hired, first fired systems are not violative of Title VII, the Third and Seventh Circuits declined to grant retroactive seniority relief. *See* notes 27 & 28 *infra*.

[11] 424 U.S. 747 (1976), *rev'g* 495 F.2d 398 (5th Cir. 1974).

[12] Petitioner Franks, a former employee of Bowman, brought an action against the trucking company on behalf of himself and others similarly situated alleging discriminatory refusal to promote, discriminatory discharge, and other racially discriminatory employment practices. Lee was permitted to intervene as plaintiff to press his individual claim against Bowman for a discriminatory refusal to hire and a discriminatory discharge and was permitted to represent other classes of black Bowman employees and job applicants. The court subdivided the petitioners into four classes: Classes 1 and 2 included black employees who had been hired for menial tasks in lower-paying jobs and were prohibited or discouraged from transferring to better departments; Class 3 was composed of all black applicants who applied for positions as over-the-road drivers prior to January 1, 1972; Class 4 included all black employees who applied to transfer to over-the-road driver positions prior to January 1, 1972. The court concluded that Franks represented the first two classes and petitioner Lee represented classes 3 and 4. 495 F.2d at 412-13.

[13] *Id.* at 421-22. The district court's denial of backpay was predicated on the following

Furthermore, in accordance with well-established precedent,[14] the court of appeals directed that class 4 members be allowed to carry over into the OTR department the full seniority they had earned in other departments of the company.[15] However, the court affirmed the district court's denial of any form of seniority relief to class 3 individuals, *i.e.*, those black applicants who had applied only for OTR positions and were refused a position in violation of Title VII,

---

grounds: First, in a rule 23(b)(2) class action, which traditionally involves injunctive and declaratory relief, backpay is not warranted; and second, Title VII prohibits such an award to unnamed class members. *Id.* at 421. Admittedly, rule 23(b)(2) speaks only to injunctive or declaratory relief and " 'does not extend to cases in which the appropriate final relief relates *exclusively* or *predominately* to money damages.' " *Id.* at 422, *quoting* FED. R. CIV. P. 23(b)(2), Advisory Committee Notes, 39 F.R.D. 69, 102 (1966) (emphasis in original). The court of appeals, however, posited that backpay awards under Title VII are not damages as such, and that even if considered equivalent to damages under rule 23, backpay was not the exclusive or predominant remedy sought in *Franks*. 495 F.2d at 422.

In response to the district court's second ground, the circuit court stated that Title VII does not require each employee to file a complaint with the EEOC prior to joining the suit, and that to hold otherwise would frustrate the central purposes of the Act. The court therefore concluded that Title VII certainly does not preclude backpay awards to nonnamed class members when only the named class representative has filed an appropriate EEOC charge. 495 F.2d at 422. *See also* Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969).

[14] In Local 189, Papermakers v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970), the court, adhering to a distinction first articulated in Quarles v. Philip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968), distinguished between departmental or job-line seniority systems and plantwide, or company, seniority systems. The former system measures seniority by the amount of time an employee has worked on a certain job or within a particular department. Upon transfer or promotion to a formerly all white department, the employee loses the seniority accumulated in his previous position and starts over, earning seniority credit based solely upon the amount of time worked in the new department. If a company has discriminated against minorities by hiring them only for jobs in the lower paying departments and has foreclosed the possibility of their being hired for more lucrative positions, a departmental seniority system operates to lock a discriminatee into an inferior position by threatening him with loss of his accumulated seniority if he should transfer. Deciding that facially neutral departmental seniority systems that perpetuate past discrimination are violative of Title VII, and are not "bona fide" within the meaning of § 703(h), the *Local 189* court ordered that the aggrieved minorities be allowed to use their accumulated plantwide seniority status for purposes of transfer, promotion, and job security. Subsequently, courts faced with challenges to a departmental seniority system operating within a previously segregated employment situation have unanimously followed this precedent. *See, e.g.*, United Transp. Local 974 v. Norfolk & W. Ry., 532 F.2d 336 (4th Cir. 1975), *cert. denied*, 96 S. Ct. 1664 (1976); Rogers v. International Paper Co., 510 F.2d 1340 (8th Cir. 1975); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974); Head v. Timken Roller Bearing Co., 486 F.2d 870 (6th Cir. 1973); United States v. Jacksonville Terminal Co., 451 F.2d 418 (5th Cir. 1971), *cert. denied*, 406 U.S. 906 (1972); United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971); Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir.), *petition for cert. dismissed*, 404 U.S. 1006 (1971). For a more thorough discussion of departmental seniority systems, see Blumrosen, *Seniority and Equal Employment Opportunity: A Glimmer of Hope*, 23 RUTGERS L. REV. 268, 275-80 (1969).

[15] 495 F.2d at 414-17.

and who thus had no seniority with the company.[16] It was this aspect of the Fifth Circuit's ruling—dealing with whether applicants who had been denied employment in violation of Title VII after its effective date may be awarded seniority status retroactive to the dates of their initial application—that had caused a clash among the circuits and prompted the Supreme Court to grant the petition for certiorari in *Franks*.[17]

THE "BONA FIDE" EXCEPTION

The conflict among the circuits had been exacerbated by varying interpretations of section 703(h)[18] of Title VII, wherein Congress granted "bona fide" seniority systems a limited exemption from the general prohibitions of the Act. The Fifth Circuit in *Franks* interpreted this section as a bar to the grant of seniority relief to nonemployee discriminatees.[19] Although cognizant that the rejected

---

[16] *Id.* at 417-18. In Local 189, Papermakers v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970), the Fifth Circuit, in dictum, drew a distinction between "earned" and "fictional" seniority, declaring:

> It is one thing for legislation to require the creation of *fictional* seniority for newly hired Negroes, and quite another thing for it to require that time *actually worked* in Negro jobs be given equal status with time worked in white jobs.

416 F.2d at 995 (dictum) (emphasis in original). In *Franks*, the court of appeals chose to follow its earlier dictum.

The Equal Employment Opportunity Commission has decried this distinction and the concomitant denial of a remedy to blacks not previously hired. EEOC Decision No. 71-1447, EEOC DECISIONS (CCH) ¶ 6217, at 4375 (1971). The Commission pointed out that blacks who have been refused employment have suffered complete discrimination in contrast to the partial discrimination suffered by those employed in the segregated departments. Viewed in this light, it was the Commission's opinion that the goals of Title VII are poorly "effectuated . . . [if] a difference in legal consequence [is based] upon the thoroughness of the discrimination." *Id.*, at 4376 n.10.

[17] The company's petition for certiorari had been denied, 419 U.S. 1050 (1974), but the Supreme Court granted certiorari on the NAACP Legal Defense Fund's cross application on behalf of the class 3 members. 420 U.S. 989 (1975).

[18] Section 703(h) provides:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . . .

42 U.S.C. § 2000e-2(h) (Supp. V 1975).

[19] 495 F.2d at 417. *Contra*, Acha v. Beame, 531 F.2d 648 (2d Cir. 1976); Meadows v. Ford Motor Co., 510 F.2d 939 (6th Cir. 1975), *cert. denied*, 96 S. Ct. 2215 (1976). The *Acha* court, stating that under certain circumstances a seniority system can lose the protection afforded a "bona fide" system under § 703(h), declared that "[u]ntil the past discrimination against these particular plaintiffs is remedied by according them the seniority position to which they are entitled, the system cannot be considered 'bona fide' . . . ." 531 F.2d at 655.

black applicants had "suffered a wrong," the Fifth Circuit nevertheless held that section 703(h) does not permit a court to award discriminatees constructive seniority.[20] It was the opinion of the court that a discriminatory refusal to hire has no effect on the bona fides of a seniority system. Consequently, despite prior discriminatory refusals to hire, a seniority system which affords benefits and conditions of employment to employees in strict accordance with length of employment would not be considered an unlawful employment practice.[21] Characterizing such reasoning as clearly erroneous, the Supreme Court asserted that the meaning and effect of section 703(h) can be properly ascertained only by a recognition that the underlying legal wrong is not an allegedly discriminatory seniority system, but rather the original racially discriminatory hiring system.[22]

Prior judicial interpretation of section 703(h) had focused on its legislative history, particularly on three memoranda[23] introduced by Senator Clark in response to fears that Title VII would destroy existing seniority systems.[24] One of these, the Clark-Case memorandum, stated that: "Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective."[25] All

---

[20] 495 F.2d at 417.

[21] *Id.* It should be noted, however, that Solicitor of Labor William J. Kilberg has stated:

> There is general consensus that the *Franks* [court of appeals] decision, insofar as it denied seniority to the individual plaintiff who proved that he suffered a discriminatory refusal of employment, stretched [the bona fide seniority provisions of Title VII] beyond its natural limits.

BNA, LABOR RELATIONS YEARBOOK—1975 109-10 (1976). Moreover, in Chance v. Board of Examiners, 534 F.2d 993 (2d Cir. 1976), Judge Oakes, confronted with the claim that the application of a last hired, first fired principle to a seniority system perpetuated the effects of the employer's prior discrimination in hiring supervisory personnel, stated that "it is permissible to alter the 'bona fide' seniority system . . . even if that seniority system does not itself independently constitute an unlawful employment practice . . . ." *Id.* at 1005 (Oakes, J., dissenting).

[22] 424 U.S. at 757-58.

[23] The three memoranda consisted of: (1) a Department of Justice memorandum written at Senator Clark's request; (2) an interpretive memorandum of Title VII presented by Senators Clark and Case; and, (3) Senator Clark's memorandum in reply to questions posed by Senator Dirksen. 110 CONG. REC. 7207, 7212-15, 7216-17 (1964).

[24] *See* H.R. REP. No. 914, 88th Cong., 1st Sess. 71-72 (1963); 110 CONG. REC. 486-87 (1964) (remarks of Senator Hill).

[25] 110 CONG. REC. 7213 (1964). The memorandum continued:

> If, for example, a collective bargaining contract provides that in the event of layoffs, those who were hired last must be laid off first, such a provision would not be affected in the least by title VII. This would be true even in the case where owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes. Title VII is directed at discrimination based on race, color, religion, sex, or national origin. It is perfectly clear that when a worker is laid off

three documents support Senator Clark's statement that "it is clear that the bill would not affect seniority rights at all."[26] Excerpts from these memoranda had been quoted extensively by the Courts of Appeals for the Third[27] and Seventh[28] Circuits to buttress a refusal to afford retroactive seniority relief to plaintiffs seeking the status they would have had but for the illegal discriminatory refusal to hire.[29]

---

or denied a chance for promotion because under established seniority rules he is "low man on the totem pole" he is not being discriminated against because of his race.

Id. at 7207.

[26] *Id.* (remarks of Senator Clark).

[27] *See* Jersey Cent. Power & Light Co. v. Local 327, IBEW, 508 F.2d 687, 707-08 (3d Cir. 1975), *vacated and remanded in light of* Franks v. Bowman Transp. Co., 96 S. Ct. 2196 (1976). Procedurally, *Jersey Central* was an unusual case. The employer, asserting that economic circumstances required it to lay off substantial numbers of workers, sought a declaratory judgment to determine whether it was obligated to allocate layoffs in reverse order of seniority pursuant to a collective bargaining contract or whether it should adhere to the provisions of a conciliation agreement with the Equal Employment Opportunity Commission requiring the employer to use reasonable efforts to increase its percentage of female and minority group employees. The Commission argued that the purpose of the conciliation agreement would be defeated by giving effect to the seniority provisions of the collective bargaining contract. The court noted that the conciliation agreement neither contained any express seniority provisions nor did it explicitly alter the layoff provisions of the collective bargaining contract. Having concluded that the seniority provisions of the collective bargaining contract did not conflict directly with the provisions of the conciliation agreement, the court proceeded to the evidentiary consideration that layoffs in reverse order of seniority would produce a disproportionate adverse effect on female and minority employment. The court posited that Congress intended to prohibit proof of this "perpetuating" effect of a plantwide seniority system because it regarded such system as bona fide, and allowed only evidence relevant to the bona fide character of the system. After reviewing the legislative history of Title VII, the *Jersey Central* court concluded that "a facially neutral company-wide seniority system, *without more,* is a bona fide seniority system and will be sustained even though it may operate to the disadvantage of females and minority groups as a result of past employment practices." 508 F.2d at 710 (emphasis in original).

[28] *See* Waters v. Wisconsin Steel Works, 502 F.2d 1309, 1318-19 (7th Cir. 1974), *cert. denied,* 96 S. Ct. 2214 (1976). In *Waters,* two black bricklayers brought an action against Wisconsin Steel challenging its "last hired, first fired" seniority system as being violative of Title VII because it allegedly perpetuated prior discriminatory policies and hiring practices. The district court held that the "last hired, first fired" seniority system negiotated between Wisconsin Steel and the bricklayer's union for the purpose of determining layoff and recall had its genesis in a period of racial discrimination, and thus failed to qualify as a bona fide seniority system within the ambit of § 703(h). Although it accepted the district court's finding of discrimination, the court of appeals, relying strongly on the Clark-Case memoranda, reversed and held that defendant's seniority system was racially neutral, qualified as a bona fide seniority system within the exemption of § 703(h), and in no way violated Title VII.

[29] *See* notes 27 & 28 *supra.* The Fifth Circuit in *Franks,* unlike the Third and Seventh Circuits, did not engage in an examination of the legislative history while analyzing the effect of § 703(h) on a seniority system. In reaching its conclusion that Bowman's seniority system was protected by § 703(h), the Fifth Circuit was guided primarily by the "earned-fictional" seniority distinction articulated by Judge Wisdom in Local 189, Papermakers v. United

The Supreme Court,[30] however, in accord with views advanced by several commentators,[31] decided that the memoranda are not dispositive of the meaning of section 703(h).[32] The history of the section,[33] the absence of significant legislative background material,[34] and the failure of the Congress to define "bona fide"[35] lend

States, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970), *discussed in* note 16 *supra*.

[30] Before reaching the merits of the case, the Supreme Court considered the threshold issue of mootness. Bowman had allegedly discriminatorily refused to hire Lee, the sole named class 3 plaintiff. After filing a complaint with the EEOC, Lee was hired by Bowman, but was later discharged for cause. Consequently, he would not have been eligible for any hiring relief granted to class 3 individuals. Bowman argued that since the named representative of the class no longer had any personal stake in the outcome, the question whether nonemployee discriminatees are entitled to retroactive seniority when hired pursuant to the district court order was moot. The *Franks* Court decided that the mere fact that a "named plaintiff no longer has a personal stake in the outcome of a certified class action [does not render] the class action moot unless there remains an issue 'capable of repetition, yet evading review.'" 424 U.S. at 754, *discussing* Sosna v. Iowa, 419 U.S. 393 (1975), *and* Board of School Comm'rs v. Jacobs, 420 U.S. 128 (1975). The *Franks* Court held that in deciding whether to reach the merits of an appeal, continuation of the named party's personal stake in the outcome of a class action is a discretionary factor rather than a part of the "cases and controversies" requirement imposed by article III of the Constitution. Thus, the only constitutional question facing the *Franks* Court was whether the seniority issues remaining before the Court constituted a "live controversy". Deciding that the unnamed members of the class were entitled to the relief already received by Lee, and to that extent an adversary relationship sufficient to satisfy the "live controversy" requirement existed, the Supreme Court deemed Bowman's mootness argument to be without merit.

[31] *See* Cooper & Sobol, *supra* note 7, at 1611-14; Note, *Last Hired, First Fired Seniority, Layoffs, and Title VII: Questions of Liability and Remedy*, 11 COLUM. J.L. & SOC. PROB. 343, 369-71 (1975); Note, *Last Hired, First Fired Layoffs and Title VII*, 88 HARV. L. REV. 1544, 1548-52 (1975).

[32] 424 U.S. at 761-62. One commentator has suggested that this is not the first time the Supreme Court has disregarded the legislative history of Title VII in cases where strict adherence to that history would frustrate the essential purposes of the Act. Note, *Last Hired, First Fired Layoffs and Title VII*, 88 HARV. L. REV. 1544, 1551-52 (1975). In Griggs v. Duke Power Co., 401 U.S. 424 (1971), it was held that an employer could not require a high school diploma or a certain score on an IQ test as a prerequisite to employment or promotion where it was more difficult for blacks than whites to meet this requirement and where the possession by employees of either qualification did not constitute a business necessity. The Court ignored statements in the legislative history explicitly declaring that an employer could set qualification standards as high as he wished even if it resulted in fewer blacks than whites being promoted or employed. *See* Note, *Last Hired, First Fired Layoffs and Title VII*, 88 HARV. L. REV. 1544, 1551-52 & n.40 (1975).

[33] Title VII, as originally passed by the House, made no express mention of seniority systems. H.R. REP. No. 914, 88th Cong., 1st Sess. 10 (1963). The subject arose during the Senate debate on the bill, prompting Senators Clark and Case to prepare the so-called Interpretive Memorandum. 110 CONG. REC. 7207, 7212-15, 7216-17 (1964). Finally, a compromise bill containing § 703(h) was introduced by Senators Mansfield and Dirksen. *Id.* at 11,926, 11,931. For a well-documented, detailed analysis of the legislative history of Title VII, see Vaas, *Title VII: Legislative History*, 7 B.C. IND. & COM. L. REV. 431 (1966) [hereinafter cited as Vaas].

[34] Unfortunately, § 703(h) was not the subject of a committee report, normally an

credence to the view that the legislative history regarding the effect of section 703(h) is markedly unclear.[36] While declining to enunciate the exact meaning and scope of section 703(h), the Court definitively declared that "[t]here is no indication in the legislative materials that § 703(h) was intended to modify or restrict relief otherwise appropriate once an illegal discriminatory practice occurring after the effective date of the Act is proved."[37] Since a discriminatory refusal to hire had been proved in *Franks*, the Supreme Court concluded that the Fifth Circuit had erred in deciding, as a matter of law, that section 703(h) barred a grant of seniority relief to class 3 individuals.[38] In so holding, the *Franks* Court removed one of the major obstacles to an award of retroactive seniority.[39]

THE "MAKE-WHOLE" REMEDY

Having first determined that retroactive seniority is not prohibited by section 703(h), the *Franks* Court then turned to the crucial issue of whether an award of retroactive seniority is appropriate under the remedial provisions of Title VII, specifically section 706(g).[40] That section grants the federal courts broad equitable pow-

---

invaluable aid in determining legislative intent. *See generally* Vaas, *supra* note 33.

[35] *See* Cooper & Sobol, *supra* note 7, at 1614.

[36] *See, e.g.*, Acha v. Beame, 531 F.2d 648 (2d Cir. 1976), wherein Judge Feinberg, before granting seniority credit to female police officers retroactive, not to the date of their appointment, but to the date they would have been appointed had the defendant not discriminated against women, stated: "The legislative history of that section is sufficiently cloudy to warrant looking at Title VII's purposes and policies in interpreting section 703(h), rather than just at the Clerk-Case [*sic*] Memorandum." *Id.* at 654.

[37] 424 U.S. at 761-62.

[38] *Id.* at 762.

[39] It is interesting to note that subsequent to the *Franks* decision, the Supreme Court denied certiorari in Waters v. Wisconsin Steel Works, 502 F.2d 1309 (7th Cir. 1974), *cert. denied*, 96 S.Ct. 2214 (1976). The judgment of the *Jersey Central* court, 508 F.2d 687 (3d Cir. 1975), was vacated and remanded to the Third Circuit for further consideration in light of the *Franks* holding. 96 S. Ct. 2196 (1976). The Third and Seventh Circuits had construed the legislative history of Title VII as indicative of Congressional intent that a facially neutral plantwide seniority system qualified as a bona fide seniority system within the ambit of § 703(h) even if the system perpetuated the effects of prior discrimination. Having characterized such systems as bona fide and concluded that, as such, those seniority systems should be sustained, the Third and Seventh Circuits held that they were precluded from altering the systems by awarding the plaintiffs retroactive seniority relief. *See* notes 27 & 28 *supra*.

[40] Section 706(g) provides in pertinent part:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without backpay . . . or any other equitable relief as the court deems appropriate.

42 U.S.C. § 2000e-5(g) (Supp. V 1975).

ers to design relief for persons aggrieved by an unlawful employment practice. The legislative history of the 1972 amendments to Title VII[41] indicates that Congress intended the courts to utilize their equitable powers "to fashion the most complete relief possible . . . to make the victims of unlawful employment discrimination whole . . . ."[42] Stressing the significance of the "make-whole" remedy,[43] Justice Brennan, writing for the majority, stated:

> Adequate relief may well be denied in the absence of a seniority remedy slotting the victim in that position in the seniority system that would have been his had he been hired at the time of his application. . . . [O]rdinarily such relief will be necessary to achieve the "make whole" purposes of the Act.[44]

The make-whole remedy advocated by the *Franks* majority embraces the two functional aspects of seniority systems: competitive status seniority and benefit seniority.[45] Competitive status seniority is utilized as the basis upon which limited benefits are allocated among competing employees.[46] An employee's right to keep

---

[41] Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103-13 (codified at 42 U.S.C. §§ 2000e to 2000e-6, 2000e-8 to 2000e-9, 2000e-13 to 2000e-14, 2000e-16 to 2000e-17 (Supp. V 1975)).

[42] 424 U.S. at 764, *quoting* 118 CONG. REC. 7166, 7168 (1972). For a discussion of the legislative history of the amendments, see note 56 *infra*.

[43] The "make-whole" remedy apparently evolved from the "rightful place" doctrine, a theory first discussed in Note, *Title VII, Seniority Discrimination, and the Incumbent Negro*, 80 HARV. L. REV. 1260 (1967). As propounded in that work, the "rightful place" remedy would rectify the effects of prior discrimination by allowing incumbent blacks to bid for "white openings" without losing any previously earned seniority, provided they meet the job qualifications. In the two leading departmental seniority cases, Quarles v. Philip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968), and Local 189, Papermakers v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970), the courts applied the "rightful place" doctrine. Subsequently, other courts confronted with these issues have adopted the same approach. *See, e.g.*, Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974); Bowe v. Colgate-Palmolive Co., 489 F.2d 896 (7th Cir. 1973); United States v. N.L. Indus., Inc., 479 F.2d 354 (8th Cir. 1973); Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir.), *petition for cert. dismissed*, 404 U.S. 1006 (1971). It should be noted that these cases all involved departmental seniority systems; rarely have the courts applied the "rightful place" doctrine to a company or plantwide seniority system. The *Franks* decision, however, has established that this doctrine should be so invoked.

[44] 424 U.S. at 764-65.

[45] For a more detailed discussion of this dual concept of seniority, see S. SLICHTER, J. HEALY & E. LIVERNASH, THE IMPACT OF COLLECTIVE BARGAINING ON MANAGEMENT 104-15 (1960).

[46] In Humphrey v. Moore, 375 U.S. 335 (1964), the Supreme Court observed that comprehensive seniority, which affects such benefits and options as promotion, demotion, order of layoff, and order of recall, "has become of overriding importance, and one of its major functions is to determine who gets or who keeps an available job." *Id.* at 346-47. *See also* Aaron, *supra* note 2 (competitive seniority affects an employee's economic security more than any other provision of the collective bargaining agreement).

his job while another worker is laid off or the opportunity to obtain a promotion to a higher paying position are among the many privileges governed by competitive status seniority. Benefit seniority, on the other hand, is utilized to determine noncompetitive or "fringe" benefits earned under the employment contract, such as pension rights, length of vacation, scope of insurance coverage and unemployment benefits.[47] The *Franks* majority reasoned that if the victim of racial discrimination is to achieve his "rightful place," an award of retroactive seniority normally must involve alteration of both aspects of seniority status. Furthermore, according to the Court, such relief should not be denied merely because the rights of other employees will undergo alteration as a result.[48]

The three dissenting Justices in *Franks* assailed this aspect of the majority approach. Chief Justice Burger argued in a separate dissent that although retroactive benefit seniority relief may be appropriate, traditional equitable principles preclude the award of competitive seniority relief at the expense of innocent employees.[49] An award of retroactive benefit seniority, like a backpay award,[50] burdens the employer without affecting in any way the rights and privileges of other employees, whereas a grant of competitive seniority causes an immediate restructuring of the ranks of all employees on the competitive status scale. For example, a white employee who had worked for five years and thus had been protected against layoff until those with less than five years seniority had first been dismissed would suddenly become more vulnerable to layoff if minorities who had been discriminatorily denied employment in 1969 were accorded six years seniority credit upon being hired to fill a vacancy in 1976. Comparing the innocent employee who had obtained his job and continued his employment without knowledge or approval of the employer's unlawful discriminatory practices to a "holder in due course" of negotiable paper or a bona fide purchaser of real property

[47] *See* Note, *Title VII, Seniority Discrimination, and the Incumbent Negro*, 80 HARV. L. REV. 1260, 1263 n.23 (1967).

[48] 424 U.S. at 774-75.

[49] *Id.* at 780-81 (Burger, C.J., concurring and dissenting).

[50] Backpay is the only remedy specifically enumerated in § 706(g). Presently there exists a strong presumption, as evidenced by the Supreme Court's recent ruling in Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), that "given a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." *Id.* at 421. To prevent the backpay liability of a defendant employer or union from reaching exorbitant proportions, Congress restricted such liability to a maximum of two years' backpay. 42 U.S.C. § 2000e-5(g) (Supp. V 1975).

without notice of any defect in the seller's title,[51] Chief Justice Burger argued that the protection and preservation of status accorded the two latter parties should also be given to the innocent employee.[52] This argument, however, has recently received little support from commentators, most of whom contend that seniority status is more properly viewed as a modifiable right or privilege conferred by the employment agreement.[53] As such, seniority rights are not deemed to be indefeasibly vested,[54] and are subject to modi-

---

[51] 424 U.S. at 781 (Burger, C.J., concurring and dissenting).

[52] *Id.* Chief Justice Burger also commented that granting minorities retroactive competitive seniority is analogous to " 'robbing Peter to pay Paul' ". *Id.* When considering methods of relief to remedy discrimination, courts have often expressed concern about inequitable reverse discrimination. Although it is most frequently invoked in cases involving imposition of racial quotas, certain courts have utilized this concern to combat the award of fictional seniority. In Local 189, Papermakers v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970), the court stated:

> No doubt, Congress, to prevent "reverse discrimination" meant to protect certain seniority rights that could not have existed but for previous racial discrimination. For example a Negro who had been rejected by an employer on racial grounds before passage of the Act could not, after being hired, claim to outrank whites who had been hired before him but after his original rejection, even though the Negro might have had senior status but for the past discrimination.

Id. at 994 (dictum). However, as Judge Oakes in Chance v. Board of Examiners, 534 F.2d 993 (2d Cir. 1976), cautioned:

> Complaints of reverse discrimination have to be evaluated constitutionally with careful regard to the facts of each case, since any affirmative action to correct past discriminatory practices may result in what seems to be unfairness to those who have benefited by those practices. The complaint of "reverse discrimination" should not be allowed to obscure the need for action to be taken to reverse, or negate, the effects of unlawful discrimination found to exist, as in this case.

Id. at 1003. Judge Oakes' observation is in accord with the spirit of the legislative history surrounding the 1972 amendments to § 706(g), *see* note 56 *infra*, and may be said to have foreshadowed the underlying rationale of the Supreme Court decision in *Franks*.

[53] *See, e.g.*, Note, *Title VII, Seniority Discrimination, and the Incumbent Negro*, 80 HARV. L. REV. 1260, 1263-64 (1967), wherein the author characterizes seniority rights as "legal rights only in a limited sense" since they "derive solely from the provisions of collective bargaining agreements" which may be changed at any time by the union and employer. *But see* DAILY LAB. REP. (BNA), May 29, 1974, at C-3, *quoted in* Stacy, *Title VII Seniority Remedies in a Time of Economic Downturn*, 28 VAND. L. REV. 487, 512 (1975), wherein Solicitor of Labor William J. Kilberg stated:

> A man has certain property rights in his present job and, in order to take this away from him, you should be able to say more than, "The company in years past discriminated against another worker and therefore we are going to take your job away from you."

[54] Two of the most frequently cited law review articles on seniority rights and Title VII, Aaron, *supra* note 2, at 1540-41 (1962), and Note, *Title VII, Seniority Discrimination, and the Incumbent Negro*, 80 HARV. L. REV. 1260, 1263-64 (1967), advance the proposition that seniority rights do not vest. These commentators have arrived at this conclusion by reasoning that since seniority rights originate in collective bargaining agreements which can readily be altered by an employer or union, and since the occurrence of certain contingencies such as loss of business or market upheaval can prevent an employee from obtaining a promotion to

fication by the courts.[55]

Chief Justice Burger's major contention—that the failure to distinguish between competitive status and benefit status seniority, and the required alteration of both types in a remedial order can rarely, if ever, be equitable—was further elaborated in a dissenting opinion authored by Justice Powell and concurred in by Justice Rehnquist. Although fully in accord with the majority's assertion that the broad language of section 706(g) and the accompanying 1972 legislative history[56] support a directive to the district courts to grant "make-whole" relief, Justice Powell noted that there is nothing in either of those sources requiring the district courts to "disregard normal equitable considerations"[57] when implementing the make-whole objective. Justice Powell contended that by holding that the district courts may not consider the countervailing interests of white employees, the *Franks* majority has at least partially divested those courts of the equitable powers granted to them by Congress.

Arguably, the award of retroactive competitive seniority more fully effectuates the make-whole objective than does the award of benefit seniority only. Yet Justice Powell contends, and his position is certainly a viable one, that such an award extends the make-

---

which his seniority rights would have otherwise entitled him, those rights are little more than a hope or expectation.

[55] In the departmental seniority cases, courts have found the reasoning of the commentators mentioned in note 54 *supra* persuasive, and thus have permitted blacks to use their departmental seniority status on a plantwide basis without expressing any undue concern for the adverse effect that the remedy produces on the seniority rights of incumbent whites. *See, e.g.*, United Transp. Local 974 v. Norfolk & W. Ry., 532 F.2d 336 (4th Cir. 1975), *cert. denied*, 96 S. Ct. 1664 (1976); Head v. Timken Roller Bearing Co., 486 F.2d 870 (6th Cir. 1973); United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971).

[56] Evincing an increased awareness of the operation of seniority systems, and citing with approval the judicial renderings in the early seniority cases, the legislative history underlying the 1972 amendments to Title VII, *see* note 41 *supra*, reinforces the intent of Congress to prohibit or modify seniority systems which perpetuate the effects of past discrimination. The report to the Senate by the Committee on Labor and Public Welfare states:

> In 1964, employment discrimination tended to be viewed as a series of isolated and distinguishable events . . . .
>
> Employment discrimination as viewed today is a far more complex and pervasive phenomenon. Experts familiar with the subject now generally describe the problem in terms of "systems" and "effects" rather than simply intentional wrongs, and the literature on the subject is replete with discussions of, for example, the mechanics of seniority and lines of progression, perpetuation of the present effect of pre-act discriminatory practices through various institutional devices, and testing and validation requirements.

S. REP. No. 415, 92d Cong., 1st Sess. at 5 (1971) (footnote omitted).

[57] 424 U.S. at 785 (Powell, J., concurring and dissenting).

whole objective to its limits.[58] Retroactive benefit seniority, like backpay,[59] aids in making the victim of discrimination whole without adversely affecting other employees. It simultaneously burdens the employer who has perpetrated the unlawful discrimination and, hopefully, deters him from engaging in such practices in the future.[60] Retroactive competitive status seniority, on the other hand, furthers the make-whole objective, but normally has no direct effect on the employer.[61] Rather, it results in the relinquishment by innocent

---

[58] *Id.* at 782. Related to this issue was another argument advanced by Justice Powell in which he contended that granting retroactive seniority to nonemployee discriminatees constituted preferential treatment based on a fiction. *Id.* at 792-93. Title VII contains an express prohibition against preferential treatment:

> Nothing contained in this subchapter shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer . . . in comparison with the total number of [*sic*] percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available workforce . . . .

42 U.S.C. § 2000e-2(j) (1970). One of the earliest interpretations of this section was expressed in Griggs v. Duke Power Co., 401 U.S. 424 (1971), wherein the Court stated:

> [T]he Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed.

Id. at 430-31.

Although Justice Powell openly acknowledged that "[a] grant of competitive seniority to an identifiable victim of discrimination is not the kind of preferential treatment forbidden by § 703(j)," 424 U.S. at 792 (Powell, J., concurring and dissenting), he did conclude that such relief would, nonetheless, be preferential. Consequently, Justice Powell urged the Court to pause before ordering district courts to create any preference, even one not barred by § 703(j). *Id.* Despite confusion concerning precisely what preferential treatment § 703(j) prohibits, it is widely accepted that "the present correction of past discrimination is not preferential treatment." Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245, 250 (10th Cir. 1970), *cert. denied,* 401 U.S. 954 (1971) (citation omitted); *accord,* United States v. Lathers Local 46, 471 F.2d 408, 412-13 (2d Cir.), *cert. denied,* 412 U.S. 939 (1973).

[59] Justice Powell noted that "[b]ackpay furthers the 'make-whole' purpose of the statute by replacing some of the economic loss suffered as a result of the employer's wrongdoing." 424 U.S. at 784 n.2 (citations omitted).

[60] In Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), the Supreme Court noted the deterrent effect of the backpay award:

> If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a backpay award that "provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history."

Id. at 417-18, *quoting* United States v. N.L. Indus., Inc., 479 F.2d 354, 379 (8th Cir. 1973).

[61] The *Franks* majority did refer, however, to the possibility of remedial action by the district courts to shift the burden of past discrimination to the employer even when dealing

employees of certain economic advantages acquired through periods of satisfactory service.[62] It was this very reason—that an award of retroactive competitive status seniority would directly impinge upon the rights and expectations of perfectly innocent employees[63]—that prompted the dissent to conclude that retroactive competitive status seniority, while always available, will not always be an appropriate remedy.[64] According to Justice Powell, proper exercise of equitable jurisdiction cannot occur in the absence of a balanced consideration of both the claims of the discrimination victims

---

with competitive status benefits. For example, the district court could order the employer to compensate each innocent employee who would otherwise bear some of the burden of past discrimination. Since this issue was not before the Court in *Franks*, the majority declined to resolve it. 424 U.S. at 777 n.38. Subsequent to the Supreme Court decision, a federal district court, in McAleer v. American Tel. & Tel. Co., 416 F. Supp. 435 (D.C. Cir. 1976), had the opportunity to pass upon the question left unanswered by *Franks*. Plaintiff McAleer was denied a promotion he was entitled to under the provisions of a collective bargaining contract because the job was given to a less qualified, less senior female in accordance with a previous consent decree that obligated AT&T to favor women regardless of seniority to eliminate past sex discrimination. McAleer, standing as an innocent employee who was disadvantaged as a result of AT&T's attempt to rectify its past discrimination against women, brought an action under Title VII seeking both promotion and damages. Denying the claim for promotion, the court stated that the consent decree had definitively established the woman's right to the job, and, citing *Franks*, it declared that to hold otherwise would result in the perpetuation of the discrimination that the consent decree was designed to eliminate. Significantly, however, the court held that McAleer was entitled to monetary damages. Agreeing with the *Franks* recognition that discriminatees and innocent employees alike must share the burden of past discrimination, the *McAleer* court stated that there was "no reason why in equitably distributing the burden among the concerned parties the onus should be shifted from the employer responsible for the discrimination to the blameless third-party employee any more than is, as a practical matter, unavoidable." *Id.* at 439-40. The *McAleer* decision seems to indicate that an award of retroactive competitive seniority status *will* burden the wrongdoing employer, even if only indirectly, in those situations where the innocent employees seek monetary compensation for their displacement in the competitive status hierarchy.

[62] *But see* note 61 *supra*. Moreover, although it may be said that seniority rights have been "acquired", or "earned," persuasive authority has maintained that those rights do not vest. Therefore, the alteration or abolition of those rights can be justified. *See* notes 53-55 and accompanying text *supra*.

[63] This concern had been expressed earlier by courts faced with requests for alteration or abolition of an employment or plantwide seniority system on the ground that the facially neutral practice violated Title VII. *See, e.g.*, Waters v. Wisconsin Steel Works, 502 F.2d 1309 (7th Cir. 1974), *cert. denied*, 96 S. Ct. 2214 (1976), wherein it was stated that awarding plaintiffs the relief requested "would be tantamount to shackling white employees with a burden of past discrimination created not by them but by their employer." 502 F.2d at 1320. *But see* notes 66 & 67 and accompanying text *infra*.

[64] 424 U.S. at 788-91 (Powell, J., concurring and dissenting). Expressing an even harsher criticism of the retroactive seniority award, Solicitor of Labor William Kilberg approved the decision of the Seventh Circuit in Waters v. Wisconsin Steel Works, 502 F.2d 1309 (7th Cir. 1974), *cert. denied*, 96 S. Ct. 2214 (1976), and declared that the court therein was saying " 'we recognize there may have been a wrong committed' in layoffs, but the remedy created another wrong." Wall St. J., Nov. 5, 1974, at 27, col. 5. Upsetting the seniority system, Kilberg continued, "doesn't look like a viable legal remedy in view of that ruling." *Id.*

and the claims of the incumbent employees.[65]

The equitable considerations advanced by the dissent did not go unheeded by the *Franks* majority. Nevertheless, Justice Brennan forthrightly rejected such arguments on the ground that the broad mandate of Title VII to prevent and remedy discrimination must frequently predominate over the interests of innocent employees.[66] The *Franks* court reasoned, as have several circuit courts previously,[67] that elimination of the wrongs violative of Title VII would often necessarily involve some adjustment of the rights of incumbent employees. Moreover, the majority declared even the remedy established by the Court's holding could not be characterized as complete restitution or an absolute achievement of the make-whole objective.[68] In other words, according to Justice Brennan, even with an award of retroactive seniority credit most discriminatees will still be in a position inferior to the position they would have achieved had it not been for the prior discrimination. The significance of this argument appears questionable, especially since a more complete retroactive seniority remedy than that awarded by the *Franks* court is difficult to conceive. Possibly, the Court simply meant that since retroactive seniority will not provide complete satisfaction to the discriminatees, it actually represents more an allocation of the burden of past discrimination among all workers than the inequitable imposition of the burden completely on the shoulders of nondiscriminatee employees. It is possible, however, that in speaking of more complete relief, the majority was referring to the use of quotas to ensure that a specified percentage of minority workers would both

[65] 424 U.S. at 788-91 (Powell, J., concurring and dissenting). In Lemon v. Kurtzman, 411 U.S. 192 (1973), the Supreme Court declared: "In equity, as nowhere else, courts eschew rigid absolutes and look to the practical realities and necessities inescapably involved in reconciling competing interests . . . ." *Id.* at 201. In *Franks*, Justice Powell posited that included among the "competing interests" inherent in a trial court's exercise of its equitable powers under Title VII should be those of the incumbent employees. 424 U.S. at 790. Conversely, the *Franks* majority held that those interests were not to be a determinative factor in the grant or denial of relief. *See* note 66 and accompanying text *infra*.

[66] 424 U.S. at 774-75. This position was aptly summarized earlier in Vogler v. McCarty, Inc., 451 F.2d 1236 (5th Cir. 1971), wherein the court declared:

> Adequate protection of Negro rights under Title VII may necessitate, as in the instant case, some adjustment of the rights of white employees. The Court must be free to deal equitably with conflicting interests of white employees in order to shape remedies that will most effectively protect and redress the rights of the Negro victims of discrimination.

Id. at 1238-39.

[67] *See, e.g.*, Vogler v. McCarty, Inc., 451 F.2d 1236, 1238-39 (5th Cir. 1971); United States v. Bethlehem Steel Corp., 446 F.2d 652, 663 (2d Cir. 1971).

[68] 424 U.S. at 776-77. *Contra, id.* at 782 (Powell, J., concurring and dissenting).

be eligible for promotions and retain their jobs despite company layoffs.[69] Whatever the precise characterization to be accorded the *Franks* relief, it is obvious that the Supreme Court deemed a sharing of the burden of past discrimination to be "presumptively necessary"[70] and "entirely consistent with any fair characterization of equity jurisdiction . . . ."[71]

In endorsing retroactive seniority as an appropriate remedy, the *Franks* majority did acknowledge that since certain circumstances may require one remedy and not another, an award of retroactive seniority, although always available, is not required in all situations.[72] Significantly, the Court did not delineate particular situations in which retroactive seniority might not be required. Rather, Justice Brennan stressed that the choice of remedies lies, in the first instance, with the district court.[73] In light of this statement, Justice

[69] The opposition to the imposition of quotas on equitable grounds presumably would be even greater than that presently raised against the relief afforded in *Franks*. A quota remedy, rather than compensating only those individuals who had actually been victims of past discrimination, would result in the grant of relief to minority members without requiring a showing that they were victims of discrimination. Obviously, then, the use of quotas extends far beyond the scope of a "make-whole" remedy, and raises serious questions of reverse discrimination. For a discussion of the use of racial quotas as a remedy for discrimination, see Blumrosen, *Quotas, Common Sense and Law in Labor Relations: Three Dimensions of Equal Opportunity*, 27 RUTGERS L. REV. 675 (1974); Note, *Constitutionality of Remedial Minority Preferences in Employment*, 56 MINN. L. REV. 842 (1972).

[70] 424 U.S. at 777.

[71] *Id.*

[72] *Id.* at 770. The concept of retroactive competitive seniority is neither novel nor unique to Title VII actions. The National Labor Relations Board (NLRB) frequently awards backpay and both types of retroactive seniority pursuant to the "affirmative actions" mandate of § 10(c) of the National Labor Relations Act, 29 U.S.C. § 160(c) (1970), when such measures are deemed necessary to recreate the conditions that would have existed had there been no unfair labor practice. *See, e.g.*, NLRB v. J.H. Rutter-Rex Mfg. Co., 396 U.S. 258, 263 (1969). Moreover, a returning veteran is entitled, upon being rehired, to the seniority status he would have enjoyed but for his absence in military service. 38 U.S.C. § 2021 (Supp. V, 1975); *see* Accardi v. Pennsylvania R.R., 383 U.S. 225 (1966); Tilton v. Missouri P.R.R., 376 U.S. 169 (1964); Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275 (1946). In addition to establishing that retroactive competitive seniority is a remedy not unknown to the courts, these analogies indicate the propriety of altering the acquired seniority rights of incumbent employees in given situations.

In *Franks*, however, Justice Powell attempted to distinguish the majority's analogy to the practice of the NLRB. Observing that the bodies entrusted with equitable discretion pursuant to Title VII and the NLRA are the district courts and the Board respectively, Justice Powell contended that the *Franks* holding stripped the district courts of their equitable powers, and thus rendered the analogy inapposite. 424 U.S. at 798-99. This contention appears erroneous, however, inasmuch as the majority decision did not divest the district courts of their discretionary authority, but rather sought only to declare that an award of retroactive seniority relief is always available in Title VII actions.

[73] 424 U.S. 779 n.41. This portion of the decision appears to further weaken Justice Powell's attempt to undermine the analogy between the majority's holding in favor of retroac-

Powell's concern that the Court's holding would encroach upon the district court's discretion to fashion appropriate relief seems unwarranted. The *Franks* majority did suggest, however, that once the plaintiffs demonstrate a minimum threshold requirement of actual injury due to discriminatory hiring practices, retroactive seniority should generally be granted.[74]

CONCLUSION

A major import of the *Franks* decision lies in its resolution of the confusion surrounding section 703(h). It is now clear that this section does not bar federal courts from awarding aggrieved plaintiffs the seniority status they would have attained but for a prior discriminatory refusal to hire. Furthermore, the majority's ruling that such an award is appropriate to effectuate the make-whole objective of Title VII provides victims of discrimination with a vital opportunity to remedy the wrongs perpetrated against them since the effective date of the Act. To ensure the widespread availability of this opportunity, the *Franks* Court directed the district courts to "take as their starting point the presumption in favor of rightful place seniority relief, and proceed with further legal analysis from that point . . . ."[75] Use of this presumption, strongly objected to by the dissenting Justices, is an approach rarely employed in previous decisions.[76] Despite the projected adverse impact on incumbent employees, it is submitted that the *Franks* presumption is not only a desirable approach, but a necessary one, if the proclaimed goals of Title VII are to receive more than lip service from the judiciary.

Notwithstanding the uncertainties clarified by the *Franks* decision, many questions regarding the application of retroactive seniority remain to be resolved by future litigation. Foremost among these

---

tive seniority and the practice of the NLRB. *See* note 72 *supra*.

[74] 424 U.S. at 772-73. The Court suggested that to justify a denial of seniority relief for individual class members in such situations, a defendant must satisfy the burden of proving that the individuals who reapply for employment were not in fact victims of previous hiring discrimination. *Id.* According to Justice Brennan, "[n]o reason appears . . . why the victim rather than the perpetrator of the illegal act should bear the burden of proof on this issue." *Id.* at 773 n.32.

[75] *Id.* at 779 n.41.

[76] *See, e.g.*, Meadows v. Ford Motor Co., 510 F.2d 939 (6th Cir. 1975), *cert. denied*, 96 S. Ct. 2215 (1976). Although the Sixth Circuit was one of the few courts prior to *Franks* to grant retroactive seniority to nonemployees who had been victims of earlier discrimination, *Meadows* did not indulge in the *Franks* presumption in favor of rightful place seniority relief. The court in *Meadows* ruled that to merit a grant of retroactive seniority, plaintiffs must present a record surpassing the sufficiency of one entitling them to an award of backpay. 510 F.2d at 949.

is the delineation of the circumstances in which a retroactive seniority award is inappropriate. Consistent with its decision to leave the choice of remedy to the district courts, the *Franks* majority declined to establish definitive guidelines for determining the appropriateness of this relief in particular situations.[77] The only directive it did issue, and admittedly it is a highly significant one, was that the competing interests of the incumbent employees are not to be determinative in evaluating the appropriateness of the remedy.

Trial courts now face the task of establishing viable standards of proof for ascertaining whether the individuals requesting retroactive seniority were, in fact, victims of previous discrimination.[78] It is submitted that the criteria should include factors such as age and residence, and, where relevant, special skills and job qualifications. Thus, once seniority has been granted to the class as a whole, if a defendant company can prove that certain individuals seeking seniority relief as members of that class were not old enough or within sufficient geographic proximity to work for the company, or that they lacked valid qualifications required for the job at the time of application, it would appear that the reason for their nonemployment with the defendant company was not a discriminatory refusal to hire. An award of retroactive seniority to such an individual would not be warranted.

Furthermore, since the retroactive seniority relief provided for in the *Franks* decision is calculated from the date of application for employment, a question immediately arises concerning those individuals who were dissuaded from applying for employment because they knew of the employer's discriminatory hiring practices. When confronted with this dilemma, lower courts have held that the absence of a formal employment application does not rebut the infer-

---

[77] The *Franks* Court noted:

> [W]e do not in any way modify our previously expressed view that the statutory scheme of Title VII "implicitly recognizes that there may be cases calling for one remedy but not another, and—owing to the structure of the federal judiciary—these choices are, of course, left in the first instance to the district courts."

424 U.S. at 779, *quoting* Albemarle Paper Co. v. Moody, 422 U.S. 405, 416 (1975).

[78] Although proof of discrimination must be submitted if the defendant contends that a particular class member was not a victim of prior discrimination, an inability to precisely prove "damages" will not necessarily preclude an award of retroactive seniority to that class member. This principle was suggested earlier by the Court when it held that " 'the constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery.' " Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 565-66 (1931), *quoting* Straus v. Victor Talking Mach. Co., 297 F. 791, 802 (2d Cir. 1924).

ence of discrimination[79] since it was probable that the potential employees realized that they would not be hired.[80] Computation of a seniority award for an individual in this situation could probably be made on the basis of age, with the court granting seniority status equivalent to that of the average worker of the same age.[81]

Conceivably, the problems left unresolved by *Franks* can be surmounted if the district courts, rather than narrowly construing the *Franks* holding, opt to interpret it as a broad endorsement of retroactive seniority relief. It is to be hoped, however, that the far-reaching significance of the *Franks* decision does not foreclose inquiry into worksharing,[82] pay cuts,[83] shorter work weeks,[84] and other alternative methods of relief.[85]

Rosemary T. Berkery

---

[79] *See, e.g.*, United States v. Navajo Freight Lines, 525 F.2d 1318 (9th Cir. 1975); Rodriguez v. East Tex. Motor Freight, 505 F.2d 40, 63-64 (5th Cir. 1974); Bing v. Roadway Express, Inc., 485 F.2d 441, 450-52 (5th Cir. 1973); *cf.* Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245, 247 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971).

[80] A recent decision by the Court of Appeals for the Ninth Circuit contained the following observation:

> It is our view that . . . the most fair seniority adjustment consistent with "rightful place" is that which permits a carryover from the date the discriminatee would have qualified but for the discrimination. To restrict the carryover to that which would have accrued from the date of application or protest ignores the Biblically recognized claims of the meek . . . .

United States v. Navajo Freight Lines, Inc., 525 F.2d 1318, 1326 (9th Cir. 1975).

[81] *See* Cooper & Sobol, *supra* note 7, at 1636.

[82] Because worksharing would presumably diminish resort to layoffs and foreclose resort to court suits, its use has been endorsed by the EEOC. Moreover, during a period of economic decline, worksharing would appear to be an especially viable alternative. One author has recently suggested, however, that this alternative "has lately fallen into disfavor, not because it is impracticable under conditions of modern industry, but because of the rise of unemployment compensation." Poplin, *Fair Employment in a Depressed Economy: The Layoff Problem*, 23 U.C.L.A.L. REV. 177, 221 (1975). For an analysis of the implications of worksharing as a remedy, see Wood, *Equal Employment Opportunity and Seniority: Rights in Conflict*, 26 LAB. L.J. 345, 347-48 (1975).

[83] Myriad groups of employees have accepted pay cuts as an alternative to the layoff of their fellow workers. *See* Raskin, *Painful Choice for Labor: Pay or Jobs*, N.Y. Times, Mar. 9, 1975, § 3 (Business and Finance), at 1, cols. 1-3.

[84] *See id.*

[85] Suggested methods have included reduction or elimination of overtime work and early voluntary retirement. *See Developments in Industrial Relations—U.S. Delays Bias Decision on Layoffs*, 98 MONTHLY LAB. REV., June 1975, at 64.